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No. 804

In the

# Supreme Court of the United States

OCTOBER TERM, 1958

BERNICE COUCH, ET VIR., STERLING COUCH,
*Petitioners,*

v.

CITY OF RICHARDSON, GERTRUDE M. GILLESPIE,
*Respondents.*

*Application for Writ of Certiorari to the Supreme Court of Texas*

## PETITION

JAMES P. DONOVAN,
WILLIAM F. BILLINGS,
109 Meadows Building,
Dallas 6, Texas,
*Attorneys for Petitioners.*

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711

No. .....

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# Supreme Court of the United States

OCTOBER TERM, 1958

BERNICE COUCH, ET VIR., STERLING COUCH,
*Petitioners,*

*v.*

CITY OF RICHARDSON, GERTRUDE M. GILLESPIE,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Comes now, Bernice Couch, joined by her husband, Sterling Couch, and making application for a Writ of Certiorari to the Supreme Court of Texas, in the above entitled cause, respectfully show this Court as follows:

### REPORTED OPINIONS

The opinions delivered by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, affirming the Trial Court's Judgment and Denying Petitioners' Motion for Rehearing are reported in 313 S. W. 2d 949.

No opinion was rendered by the Supreme Court of Texas, other than "Writ Refused, N. R. E.", which is unreported.

## JURISDICTION

The Judgment sought to be reviewed was rendered by the Supreme Court of Texas on November 11, 1958, and Motion for Rehearing thereon denied by that Court on December 31, 1958. The Supreme Court Judgment held that there was no reversible error committed by the Court of Civil Appeals in affirming the Judgment of the Trial Court entered April 11, 1957.

The Jurisdiction of this Court to review by Writ of Certiorari the Judgment entered in this cause is conferred by 28 U. S. C. 1257.

## QUESTION PRESENTED

Is the Texas Courts' refusal to enforce valid Texas Statutes prohibiting acquisition of any interest in a public Street by adverse possession, or the closing thereof without an election, and the entry of a Judgment, based upon adverse possession and a City Ordinance passed after trial of the cause, which Judgment divested the Petitioners and the Respondent City of all rights in a public Street and vested fee simple title thereto by adverse possession in respondent Gillespie, a violation of Petitioners' rights of due process, equal protection of the laws and immunity from ex post facto legislation as guaranteed by the Constitution of the United States?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of law are involved in this case:

*Constitution of the United States:*

Article 1, Section 10. "No State shall * * * pass any * * * ex post facto law * * *."

Amendment V. "* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV. "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

*Constitution of the State of Texas—Appendix-25*

*Texas Statutes:*

Article 1019, Revised Civil Statutes of the State of Texas, Volume 2A, Vernon's Texas Civil Statutes, Page 231:

"Art. 1019. Special Election

"No public square or park shall be sold, and no street or alley closed, until the question of such sale or closing has been submitted to a vote of the qualified voters of the City or town, and approved by a majority of the votes cast at such election."

Article 5517, Revised Civil Statutes of the State of Texas, Volume 16, Vernon's Texas Civil Statutes, Page 609:

> "Art. 5517. Right of the state, counties, cities and school districts
>
> "The right of the State, all counties, incorporated cities and all school districts shall not be barred by any of the provisions of this Title, nor shall any person ever acquire, by occupancy or adverse possession, any right or title to any part or portion of any road, street, alley, sidewalk, or grounds which belong to any town, city, or county, or which have been donated or dedicated for public use to any such town, city, or county by the owner thereof, or which have been laid out or dedicated in any manner to public use in any town, city, or county in this State."

## STATEMENT OF THE CASE

The City of Richardson is an incorporated City in Dallas County, Texas. Dallas Street is a public street within said City by donation and dedication of the original donors of the land to the City. The Petitioners are the owners of land adjacent to and abutting on the said Dallas Street. The Respondent, Gertrude M. Gillespie, claimed title to a portion of Dallas Street abutting on and adjacent to the lands owned by the Petitioners.

The Petitioners instituted this action in the District Court of Dallas County, Texas, against the Respondents, praying for an adjudication of all Parties' rights in the aforementioned Dallas Street, with incidental injunctive relief. The City of Richardson filed a disclaimer to Peti-

titoners' action. The Respondent, Gillespie, answered claiming title to Dallas Street by virtue of a Deed to a predecessor in 1937, abandonment by the City by Ordinance passed in 1937, and adverse possession, raising such claims by a Cross-Action in Trespass to Try Title. The Petitioners defended said Cross-Action upon the basis of the quoted Texas Statutes, denial of abandonment and insufficiency of the Deed alleged to be the source of title.

Upon trial of the cause, the Court submitted to the Jury issues as to abandonment of the Street, and, over Petitioners' objection, issues as to Respondent Gillespie's adverse possession and as to whether Petitioners could be compensated in money for damages sustained. The Jury found that the Street had *not* been abandoned in 1937 as alleged by Respondent Gillespie, that Petitioners could be compensated in money for damages sustained, and that Respondent Gillespie and her predecessors in title had been in adverse possession of the portion of Dallas Street involved for ten years or more prior to commencement of this action.

The Jury rendered its verdict on April 6, 1956. In January 1957, eight months after the Jury Verdict, the Respondent City of Richardson passed an Ordinance attempting to vest title to the public street in the Respondent Gillespie and her predecessors in title, without consideration therefor.

The Respondent Gillespie moved for an interlocutory Judgment on the basis of the Ordinance referred to but that Motion was never acted upon by the Court. However,

one year and five days after the Jury verdict, the District Court entered Judgment vesting title in fee simple in Respondent Gillespie, and effectively divesting the City and the Petitioners of any and all right or interest in the portion of Dallas Street described in the Judgment, including Petitioners' private easement therein.

Petitioners urged the Application of the quoted Texas Statutes to the Trial Court, on Appeal to the Court of Civil Appeals and finally to the Supreme Court of Texas by their application for a Writ of Error. Upon denial of Petitioners' application to the Supreme Court for a Writ of Error, Petitioners by their Motion for Rehearing (Appendix 19) specifically raised the Federal Questions of the denial of due process, equal protection of the laws and immunity from ex post facto legislation, which Motion was denied without opinion on December 31, 1958.

## ARGUMENT—SUBSTANTIAL QUESTION

**The Appellate Courts' utter disregard of the issues raised by the pleadings, and creation of fanciful issues to distort the legal effect of the jury verdict, combined with their reliance upon an ordinance passed after trial of the case to sustain an invalid judgment is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.**

Under Texas practice, the Trial Court is required to submit to the Jury only those questions of fact which are raised by the pleadings and proof in the cause on trial.

In the absence of legal objection it is presumed that all issues of fact have been properly submitted, and that facts material to the alleged cause of action are established as true unless issues be submitted relevant thereto. If the Plaintiff fails to prove such material facts then the Court is obligated to dismiss the Petition and there is no reason for a Jury Verdict. The foregoing rule of Judicial Process is so well established that citation of authority therefor is deemed unnecessary.

Applying this rule to the case at bar, the Petitioners alleged that Dallas Street was a dedicated City Street and that as purchasers of abutting lots they had a private and public easement therein. Petitioners pleaded Article 1019, supra, requiring a City election as a condition precedent to abandonment or closing of a public street, alleging none had been held. No issue was submitted to the Jury as to the truth of such allegations and both being material to the Plaintiffs' cause it is to be presumed that they were established by the proof. The Respondent Gillespie based her claim to title upon a deed to her predecessor in title in 1937 and abandonment of the street by the Respondent City of Richardson by ordinance in 1937. The Jury specifically found that the Street was not abandoned by Ordinance in 1937. (Plaintiffs' Petition—Record—District Court Tr. Page 16; Defendant's Answer and Cross-Action—Record—District Court Tr. Page 80; Jury Verdict—District Court Tr. Pages 136-138, Appendix 50.)

On the basis of the issues submitted to the Jury it must therefore be concluded that the Court found as a matter of

law that Dallas Street was a dedicated Public Street and that no election as required by Article 1019, supra, was held to authorize closing or abandonment of said Street. No election having been held then the validity of Defendant's predecessor's deed became immaterial and there was no issue to be submitted thereon.

To sustain the Judgment rendered by the Trial Court, the Court of Civil Appeals "manufactured" an issue not raised by the pleadings as to use and abandonment writing as follows:

> "It is true that the jury in special issue No. 2 was asked to find whether the property was *ever* used by the public prior to 1937, and the jury answered 'Yes'. But the jury did not find *when* the property was so used. Appellants allege in their petition that the property was first dedicated as a street in 1873 and then rededicated in 1878. Thus a period of 59 years intervened between the dedication and the year 1937. During that stretch of years there may have been a use by the public, followed by a statutory abandonment of the street, or a common-law abandonment of it by the public. We must accept the jury's verdict that sometime prior to 1937 the property was used by the public, but there is no basis to reverse the trial court's judgment on the assumption that an abandonment of the street rid not take place after such use by the public." (Appendix, Page 38.)

By this indulgence in speculation and conjecture the Court of Civil Appeals conjured up issues upon the basis of what "*may*" have happened, not upon what the parties pleaded and proved. In this fantasy the said Court, with the tacit approval of the Supreme Court of Texas, rationalizes its repudiation of the Jury's findings on the issues

which the Trial Court determined were within the Jury's province. Such indulgence was indeed a departure from orderly judicial process since no appellate Court has authority to inject into a case issues not raised by the litigants.

A second flagrant departure from orderly judicial process is found in that paragraph of the Court of Civil Appeals' opinion reading as follows:

> "At the time the court rendered judgment there was on file appellee's motion for an interlocutory judgment against the City, and attached to the motion was a certified copy of a city ordinance recognizing a prior abandonment of the alleged street. Such confirmation of an earlier abandonment is in no way inconsistent with the jury's finding that the City did not during the summer of 1937 pass an ordinance closing that portion of the street in controversy." (Appendix, Page 38.)

The Court failed to note that the motion referred to was never acted upon by the trial court, or that the Ordinance mentioned was not passed until eight months *after* the Jury had rendered its verdict. Consideration of the Court's statement reveals a completely new theory of jurisprudence: A city council after a verdict rendered by a jury contrary to the desires of the Councilmen, may nullify that verdict by passing an ordinance, and a successful litigant may be deprived of his rights upon the basis of an ordinance never pleaded or proved upon the trial of the cause. The Court also failed to mention that no election required by Article 1019, supra, was held prior to the passage of the 1957 ordinance, which election would obviously be necessary to its validity.

The only other reason offered by the Court of Civil Appeals for affirmance of the Trial Court's Judgment was that, because the City of Richardson had disclaimed any rights in the street the appellants were not entitled to complain of the judgment against the City. The proposition that a City is a Trustee of all public rights for the benefit of its citizens, is recognized in Texas, as it is throughout the United States; that a beneficiary may assert and defend his rights in the Trust Res, when the Trustee fails to do so, is also good Texas and United States Law. To hold that a citizen cannot protect his interest in public rights, when his elected representatives fail to do so, would permit every petty politician in the country to aggrandize himself by wanton distribution of public assets and rights to favored constituents or those capable of making suitable compensation therefor.

Petitioners submit that in view of the foregoing, the affirmance of the Judgment of the Trial Court on the basis stated, with the approval of the Supreme Court of Texas, was a violation of Petitioners' rights to due process and freedom from the burden of ex post facto laws, guaranteed by the Constitutions of the United States and Texas.

**The refusal of the Trial and Appellate Courts to give effect to the provisions of Texas statutes, Articles 1019 and 5517, constitutes a repudiation of legislative authority by the judiciary and a denial of Petitioners' rights to due process and equal protection of the laws.**

The record shows that Petitioners pleaded in bar of the Respondent Gillespie's claim the failure of the City of

Richardson to hold a public election under Article 1019, supra, before attempting to abandon or close Dallas Street, a street dedicated to public use. They also pleaded Article 5517, supra, which was construed in *Spencer v. Levy, Civ. App. Tex., 173 S. W. 550*, in the following language: "We think that the meaning of said statute is that 'limitation as to a street does not run in favor of any person nor against any person'."

The Supreme Court of Texas construed Article 1019, supra, in June of 1957, in a case involving the leasing of an area *under* a public park, *Zachry v. City of San Antonio, 305 S. W. 2d 558, rehearing denied October 9, 1957*, and wrote as follows:

> "By its wording the statute includes parks and the reasoning of the above cases will apply to prevent a sale or incumbrance of Travis Park by the City of San Antonio until authorized to do so by a majority of the qualified electors of such city."

An examination of the pleadings of the Respondents in this cause will reveal that they have never claimed that any election was ever held by the City of Richardson to authorize the abandonment or closing of Dallas Street even though Petitioners attacked their claim under deed upon the absence of such an election. The Court of Civil Appeals disposed of this point by saying:

> "Article 1019 provides that no street shall be closed until the question of its closing shall be submitted to a vote of its citizens. Appellee contends that Arts. 1018 and 1019 should be interpreted together and are applicable only to streets closed for use by a railroad or other corporation having power of eminent domain.

> See Session Laws of 1913, page 326. However we shall not pass on the question, for we consider it unnecessary to do so in order to make a proper disposition of this appeal." (Appendix, Page 37.)

The Court of Civil Appeals mentioned the defense of Article 5517, *but made no decision on the question raised.* The Court stated the meaning of the Article to be: "*Article 5517 provides that the rights of cities to their streets shall not be barred by limitations, nor shall any person acquire title to any portion of a city street by adverse possession.*"

Having thus correctly stated the meaning of the law, the Court refused to apply it to the Judgment appealed from, and gave no explanation or excuse for its failure to do so. (Appendix, 37.) The Supreme Court by refusal of a Writ of Error compounded this Judicial repudiation of Legislative authority.

An examination of the Judgment of the Trial Court (Appendix, 47) will establish that it attempted to vest title to a portion of Dallas Street in Respondent Gillespie upon the sole basis of the Jury finding of adverse possession.

Petitioners submit that the Trial and Appellate Courts' action in refusing to apply the cited statutes was a denial to the Petitioners of the equal protection of law guaranteed by the 14th Amendment to the Constitution of the United States.

If the decision of the Supreme Court of Texas and that of the Trial Court and Civil Appeals be allowed to stand then Texas has reached a point where there is one law for

San Antonio and another for Richardson under one Statute. If this be true then law has ceased and "politics" has taken over.

## CONCLUSION

Petitioners respectfully pray that this Court issue a Writ of Certiorari to the Supreme Court of Texas and that after review and hearing the Judgments of the Supreme Court, Court of Civil Appeals and District Court be reversed and a Declaratory Judgment be ordered in favor of the Petitioners.

Respectfully submitted,

JAMES P. DONOVAN,
James P. Donovan
WILLIAM F. BILLINGS,
109 Meadows Building,
Dallas 6, Texas,
*Attorneys for Petitioners.*

# APPENDIX


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# IN THE SUPREME COURT OF TEXAS

November 12, 1958.

No. A-6936.
Bernice Couch et vir.
vs.
City of Richardson et al.

From Dallas County, Fifth District.

This day came on to be heard application of petitioners for a writ of error to the Court of Civil Appeals for the Fifth District, and, after due consideration, the Court having determined that the application presents no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused; that the applicants, Bernice Couch and husband, Sterling S. Couch, and their surety, Travelers Indemnity Company, pay all costs incurred on this application.

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I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment of the Supreme Court of Texas on application for writ of error in the case of Bernice Couch et vir. vs. City of Richardson et al., No. A-6936, from Dallas County, Fifth District, as such judgment appears of record in the minutes of said Court under date of November 12, 1958.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 26th day of March, 1959.

/s/ Geo. H. Templin

Clerk, Supreme Court of Texas.

(Seal)

# IN THE SUPREME COURT OF TEXAS

December 31, 1958.

No. A-6936.
Bernice Couch et vir.
vs.
City of Richardson et al.

From Dallas County, Fifth District.

This day came on to be heard petitioners' motion for rehearing of application for writ of error, and, after due consideration, it is ordered that said motion be, and is hereby, overruled.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case of Bernice Couch et vir. vs. City of Richardson et al., No. A-6916, from Dallas County, Fifth District, as such order appears of record in the minutes of said Court under date of December 31, 1958.

IN TESTIMONY WHEREOF, witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 26th day of March, 1959.

/s/ Geo. H. Templin
Clerk, Supreme Court of Texas

(Seal)

NO. A-6936

IN THE
SUPREME COURT OF TEXAS

---

BERNICE COUCH, ET VIR.

PETITIONERS

VS.

CITY OF RICHARDSON, ET AL.

RESPONDENTS

---

PETITIONERS' MOTION FOR REHEARING UPON REFUSAL OF APPLICATION FOR WRIT OF ERROR

TO SAID HONORABLE COURT:

Now come the Petitioners in the above entitled and numbered cause, and respectfully move this Court to set aside the Order, heretofore entered in this Court on the 12th day of November, 1958, refusing Petitioners' Application for a Writ of Error to the Court of Civil Appeals for the 5th Judicial District of Texas, and to grant a rehearing, and reverse said Judgment of the Court below for the following reasons:

I

THE ORDER "REFUSED. NO REVERSIBLE ERROR" IS ILLEGAL UNDER RULE 483, TEXAS RULES OF CIVIL PROCEDURE.

The Judgment appealed from vested title to a City Street in an individual on the sole basis of adverse possession; the vesting of such title deprived Petitioners of their rights as owners of property adjoining said Street.

The Points of Error raised in Petitioner's Application for a Writ were not "harmless" but were points of "reversible error" within the accepted Texas definition of that term in that they were fundamental and operated to the injury of the Petitioners. A brief summary of those points might be stated as follows:

1. The Trial Court was without Jurisdiction to enter the Judgment appealed from;

2. The judgment appealed from was entered only through the *judicial repeal* of two Texas Statutes, the one prohibiting the closing of any public street without the approval of a majority of the votes cast at a special election (Art. 1019 TRS) and the other providing against any person's acquiring any right or title to any part or portion of any street by occupancy or adverse possession; (Art. 5517 TRS);

3. The opinion of the Court of Civil Appeals was based on an Ex Post Facto law (a City Ordinance passed eight months after trial purporting to confirm an illegal grant of public property to an individual, without consideration);

4. The lower Court of Appeal denied the right of a citizen to compel his public officials to be faithful to their trust, and to take action to prevent dissipation of the public's rights for the benefit of an individual;

5. The lower Courts held that, both by action and inaction, a City governing body can divert public rights to one citizen at the expense of all others interested in violation of General Statutes of Texas.

The foregoing summary is believed to fairly state the law of the case. The points of error raised go to the entire substantive law of the lower Courts' Judgments. No points of technical or "harmless error" are included in the foregoing summary of the law applied to the jury verdict.

Petitioners submit that on the record, and the law of the case, the Supreme Court is without authority to dispose of Petitioners' Application for a Writ of Error by the Order entered herein, since it is inconceivable that this Court could take the position that none of the errors complained of are of the type which do not require reversal. Such a decision under Rule 483 is only proper where the error committed is harmless.

## II

## THE ORDER ENTERED FAILS TO COMPLY WITH THE PROVISIONS OF TEXAS RULE OF PROCEDURE, 483, REQUIRING THE GRANTING OF A WRIT IN CASES OF CONFLICT UNDER SUBDIVISION 2, ARTICLE 1728 OF THE REVISED CIVIL STATUTES OF TEXAS OR IN THE ALTERNATIVE A STATEMENT OF AGREEMENT WITH THE DECISION OF THE COURT OF CIVIL APPEALS IN THE CASE.

That the decision in the case at bar is in conflict with the decision of this Court and other Courts of Civil Appeals in

this State as to whether a Judgment signed and rendered by the Court at the second term after trial is void cannot be questioned. Judge Dixon in his opinion, after commenting on the cases of British General Fire Insurance Co. v. Ripy, Coats v. Garrett and Williams v. Wyrick, held that the latter case overruled the two former cases mentioned, and that a Court has jurisdiction to render judgment at the second term of Court after trial was held. On the other hand, Judge Barrow of the San Antonio Court of Civil Appeals, in an opinion rendered in the case of G. F. Turner v. Texas Sportservice Inc., on facts identical with those in the case at bar, held that a Judgment rendered at the second term after trial was had was void, and based his opinion on British General Ins. Co. v. Ripy, Coats v. Garrett and Pelham v. Sanders. It is difficult to conceive of a clearer conflict of opinions, and the answer as to which line of authorities is correct is vital to a proper decision of this cause.

*Petitioners submit that in all fairness, not only to them but to the Bar of this State, this Court is obligated to settle this question.*

The second conflict called to the attention of this Court involved the legal effect of Article 1019 of Texas Revised Civil Statutes. The Judgment herein by divesting the City of its rights in Dallas Street, effectively closes that street. The Court of Civil Appeals refused to pass on the question as to whether closing could be thus effected without an election. This Court, in Zachry v. City of San Antonio, construed Article 1019 as to sale or incumbrance of a City

Park, and held that neither transaction could be accomplished without authorization of a majority of the qualified electors of the City. The Order entered in this case is directly in conflict with your decision in the Zachry case for if the general statute supersedes City Charter provisions with reference to selling or incumbering a City Park, the same statute must have the same effect as to the closing of a city street. The conflict of the Zachary decision rendered on October 9, 1957 with the Order entered herein on November 12, 1958 can hardly be said to contribute to an orderly system of jurisprudence, which is the ultimate end of the Texas Rules of Civil Procedure.

III

THE ORDER ENTERED HEREIN, IF ALLOWED TO STAND WILL CONSTITUTE AN UNCONSTITUTIONAL DEPRIVATION OF THE RIGHTS GUARANTEED TO THE PETITIONERS BY THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA AND THE STATE OF TEXAS.

In consideration of this point, the Court's attention is called to the fact that a right to use a public street in common with others is an easement and property within the meaning of that term as used in the Constitutions of the United States and Texas. See Justice Gannon's opinion in State of Texas ex. rel. Pan American Production Company v. Texas City et al., 295 S.W. 2nd 697, (1956) at page 704, affirmed 303 S. W. 2nd 780, Appeal dismissed 78 S. Ct. 533, 355 U. S. 603, 2 L. Ed. 2d 523.

The Judgment appealed from shows on its face that the trial Court purports to vest title to a portion of a City Street in an individual upon the sole basis of adverse possession. This judgment is in direct contravention of Article 5517 of the Texas Revised Civil Statutes which expressly prohibits acquisition by anyone of any interest in a City Street by occupancy or adverse possession. The Judgment is also in direct violation of Article 1019, Texas Revised Civil Statutes prohibiting sale or closing of a City Street without authorization of a majority of the voters voting in an election provided for by the statute.

The legal effect of this Court's Order, "Reversed. No Reversible Error" is the absolute repudiation of the two statutes mentioned, the unqualified denial of the protection of those statutes to these Petitioners, and the tacit approval of the Larceny of the Petitioners' rights for the benefit, not of the public, but of another individual, by Public Officials charged by law with protection of the rights converted.

In Marrs v. Railroad Commission, 177 S. W. 2d 941, at page 949, this Court quoted with approval the following:

> "In Thompson v. Consolidated Gas Co., 300 U. S. 55, 80, 57 S. Ct. 364, 376, 81 L. Ed. 510, 524, it was said: 'And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid'."

The proposition of law quoted above is still valid, and yet this Court, by its decision herein, affirmatively rejects it.

Petitioners submit that if this Court's Order be allowed to stand, said Order will be unconstitutional as to them in the following respects:

1. It will deny Petitioners equal rights, and give to Respondent an exclusive separate public emolument or privilege, not in consideration of public service, all in violation of Article I, Section 3, Texas Constitution;

2. It will grant to Respondent an irrevocable and uncontrollable privilege prohibited by Article I, Section 17, Texas Constitution;

3. It will deprive the Petitioners of property and privileges, without due course of the law of the land, in contravention of Article I, Section 19, Texas Constitution;

4. By effectively nullifying Articles 5517 and 1019, Texas Revised Civil Statutes, through failure to require enforcement of the provisions thereof by the lower Courts, this Court has repealed those statutes and usurped the power of the Legislature in violation of Article II, Section 1, Texas Constitution;

5. By affirming the opinion of the Court of Civil Appeals it confirms the use of an Ex post facto law, to deprive Petitioners of their rights in violation of Article I, Section 19, Texas Constitution;

6. By failing to give effect to Articles 5517 and 1019 mentioned above, the Court Order suspends the operation thereof, which power is expressly reserved to the Legislature by Article I, Section 28, Texas Constitution;

7. By depriving the Petitioners of property without due process of law, in violation of the 5th and 14th Amendments to the United States Constitution;

8. By withholding from Petitioners the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States;

9. By permitting the deprivation of Petitioners rights by an Ex Post Facto law, in violation of Article 1, Section 10 of the United States Constitution.

It is Petitioners position that further study of this matter will induce this Court to reverse the Judgments of the lower Courts in this cause, which Judgments, in the final analysis, are but a confirmation of illegal and corrupt action and inaction by Public Officials in breach of their Public Trust. In short, the Judgments and the Order of this Court confirm the right of a group of City Officials to ignore the General Statutes of Texas and, in violation thereof, divest the Petitioners, the City, its property owners and taxpayers of valuable rights for the sole benefit of one individual favored by men in position of authority. Such a result is wholly repugnant to the law of this land, and it is incredible to even consider that this Court would approve it.

WHEREFORE, Petitioners pray that a rehearing be granted in this cause upon their Application for a Writ of Error to the Court of Civil Appeals for the 5th Judicial District of Texas, and that upon such rehearing an Order

be made Granting the Writ, reversing the Judgments appealed from and rendering a Declaratory Judgment in favor of Petitioners as originally prayed for.

Respectfully submitted,

Billings & Donovan

By /s/ James P. Donovan

Attorneys for Petitioners
109 Meadows Building,
Dallas 6, Texas

I do hereby certify that I have mailed a copy of the foregoing Motion for Rehearing to H. Louis Nichols, Attorney of Record for the City of Richardson, Republic Bank Building, Dallas, Texas and to Sanders, Lefkowitz & Green, Attorneys for Respondent, Gertrude M. Gillespie, Kirby Building, Dallas, Texas, on this 26th day of November, 1958.

/s/ James P. Donovan
James P. Donovan

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the foregoing eight (8) pages contain a true and correct copy of motion for rehearing of application for writ of error, together with the endorsements thereon, in the case of Bernice Couch et vir. vs. City of Richardson et al., No. A-6936, from Dallas County, Fifth District, as such motion appears of record now on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 26th day of March, 1959.

/s/ Geo. H. Templin
Clerk, Supreme Court of Texas.

(Seal)

No. 15,376

Bernice Couch et vir,
Appellants,
v.
City of Richardson et al.,
Appellees.
} From a District Court of Dallas County.

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On April 12, 1955 appellants Bernice Couch and husband, Sterling Couch, sued the City of Richardson, Texas, and Gertrude M. Gillespie, a feme sole, seeking a judgment declaring their rights in the use and occupancy of what they allege to be a dedicated street called Dallas Street in the City of Richardson, Texas. They sought also an injunction to restrain the defendants from obstructing the said street and from denying appellants their right to use the street.

The City of Richardson answered appellants' suit with a disclaimer stating that the City has no interest in the property described or in the controversy alleged in appellants' petition, and stating further that the City is asserting no claim of right, title or interest in such property.

Appellee Gertrude Gillespie filed an answer and cross-action (trespass to try title) pleading the two, four, five, and ten year statutes of limitation, and asserting title both by warranty deed and by ten years' adverse possession of a portion of the alleged street.

The City of Richardson also filed a disclaimer to appellee Gillespie's cross-action, again stating that it has no interest in the tract of land described in the cross-action, and is asserting no interest therein.

Appellants filed a supplemental petition in which they pled not guilty to appellee's cross-action.

On April 5, 1956 a jury returned a verdict in which special issues were answered as follows:

1. The City Commission of the City of Richardson did not during the summer of 1937 pass an ordinance closing and abandoning or attempting to close and abandon that portion of Dallas Street in controversy.

2. As to whether that portion of Dallas Street was ever used by the public before 1937 as a street, the jury answered "Yes."

3. Appellant Couch will not suffer damages which cannot be compensated for in money if the portion of the street in controversy is not opened to public use.

4. Appellee Gillespie and those through whom she holds conveyances held peaceable and adverse possession of the property, cultivating, using or enjoying same, paying taxes thereon, and claiming under a duly registered deed for a period of five years or more prior to April 12, 1955.

5. Appellee and those under whom she claims have been in peaceable and adverse possession of the property, cultivating, using or enjoying the same for a period of ten years or more before April 12, 1955.

On April 19, 1956 appellee Gillespie filed a motion for judgment on the jury findings and in the alternative for judgment non obstante veredicto. On April 30, 1956 appellants Couch filed motions for judgment non obstante veredicto and judgment on the jury verdict.

On January 14, 1957 appellee Gillespie filed a motion for interlocutory judgment against the City of Richardson, predicated on the pleadings of the parties already on file, including the disclaimer of the City; and further upon the grounds of Ordinance No. 26-A enacted by the City of Richardson on January 8, 1957, a certified copy of which ordinance was attached to the motion. This ordinance *confirmed the previous abandonment by the City of a portion of Dallas Street conveyed to John M. Wright on November 22*, 1937, and provided for the quitclaiming of same to John M. Wright and his successor in title, Gertrude M. Gillespie.

On April 11, 1957 the trial court signed a judgment in favor of appellee and the City of Richardson in appellants' suit, and against appellants and the City of Richardson in appellee's cross-action. The judgment contains this recitation:

"* * * the court having duly heard and considered a motion for judgment, *and such additional considerations and findings as were authorized by law having been had and made* * * *"; (emphasis ours). Then the judgment provides that "plaintiffs take nothing by their suit, and that the cross-plaintiff, Gertrude M. Gillespie on the ver-

dict of the jury, and on the disclaimer filed by the City of Richardson, do have and recover of and from the defendants, Bernice Couch and husband, Sterling Couch, and the City of Richardson, the title and possession of the premises * * *."

The City of Richardson did not file a motion for a new trial and has not appealed from the judgment against it.

Appellants Couch filed a motion for new trial; which was overruled June 6, 1957. Thereafter appellants filed an appeal bond which must be the subject of later discussion for the reason that appellee contends that the bond was filed too late to give this Court jurisdiction of the appeal.

A Statement of Facts was not tendered in this Court until more than five months after appellants' motion for new trial was overruled. This statement, on motion of appellee, was stricken from the official record because it was not filed in accordance with Rule 386 T.R.C.P. In the absence of a Statement of Facts we must presume that the jury verdict and the judgment of the court are supported by the evidence. 3-B Tex. Jur. 386.

Prior to the submission of this appeal on its merits appellee presented a motion to dismiss the appeal on the grounds that we do not have jurisdiction because the appeal bond was not filed within the thirty days required by Rule 356 T.R.C.P. We overruled the motion. In connection with the appeal on the merits appellee renews her contention that we do not have jurisdiction of the appeal, and it is this renewed contention which we shall now consider.

The motion for new trial was overruled on June 6, 1957. There was an interval of time following the overruling of appellants' motion when appellants were not represented by counsel, their attorneys with the court's permission having withdrawn from the case. During this interval appellants apparently undertook to represent themselves and to perfect their appeal. On July 6, 1957, the thirtieth day after their motion was overruled, appellants presented a written appeal bond signed by themselves as principals, but not bearing the signatures of any person or persons as sureties. In the blank space reserved on the bond form for the names of sureties was written the word "Cash". At the same time this instrument was filed with the District Clerk, Mrs. Couch tendered her personal check in the amount of $1,000.00. The District Clerk accepted the bond signed by appellants together with the $1,000.00 personal check as a cash bond as provided by Rule 356 T.R.C.P., and issued to appellant Mrs. Couch his receipt No. 5079 for $1,000.00 cash. At a hearing before the trial court in an effort to correct the record, the trial court expressly found that at the time Mrs. Couch presented her personal check for $1,000.00 to the District Clerk she had no deposit at the bank a sum more than sufficient to cover payment of the check.

In our opinion the above actions of appellants constituted the filing of a cash appeal bond. Rule 356 T.R.C.P.; Thompson v. Thompson, 236 SW 2d 779 at p. 790. And whatever infirmities and irregularities there may have been in the bond, if there were any, they were not fatal to

our acquiring jurisdiction. The bond was subject to correction, amendment and substitution under Rules 365 and 430 T.R.C.P. Hugo v. Seffel, 49 SW 369; Conlee v. Burton, 188 SW 2d 713.

However, two days later appellants again appeared and filed with the District Clerk an appeal bond for $1,000.00, signed by themselves as principals and The Travelers Indemnity Company as surety. This appeal bond was accepted by the District Clerk in lieu of and in substitution for the cash bond described above. The personal check of Mrs. Couch had not been sent to the Bank. It was still in the possession of the District Clerk. When the new bond was filed and accepted by the District Clerk, he returned Mrs. Couch's check to her, and wrote the word "Void" across his copy of the receipt for $1,000.00 which he had issued to her. No order of court was obtained authorizing this substitution of appeal bonds. While this procedure may have been somewhat irregular, again we hold that under Rules 365 and 430 T.R.C.P. the irregularity was not of such a nature as to make the bond void, or to deprive us of jurisdiction of the appeal. Appellee's renewed motion to dismiss the appeal is overruled.

Appellants have employed new counsel who have filed a brief in their behalf. In their first point on appeal appellants take the position that the judgment of the trial court is void on its face because it was signed and entered in violation of Rule 330(j), in that the court did not render a judgment based on the jury verdict until the second term after the return of the verdict.

The verdict of the jury in this case was returned April 3, 1956. Appellee's motion for judgment was filed April 30, 1956. The court rendered judgment April 11, 1957—nearly a year later. The 134th District Court, sitting in Dallas County, is authorized by statute to hold two terms of court each year, one term beginning on January first and ending on June 30th, and the second beginning on July first and ending on December 31st in each calendar year. The judgment in this case was not rendered until the second term after the return of the jury verdict. Is the judgment therefore void, as appellants contend? In support of their contention appellants rely on the holdings in British General Fire Insurance Co. v. Ripy, 106 SW 2d 1047 (opinion adopted by Supreme Court), and Coats v. Garrett, 283 SW 2d 289, by the Texarkana Court of Civil Appeals.

The cases cited do indeed hold that a court is not authorized to enter a judgment at the second term after return of a jury verdict, and we would feel constrained to follow them were it not that our Supreme Court has apparently overruled the holding in the Ripy case. Williams v. Wyrick, 245 SW 2d 961. The Wyrick case is not in point with the facts before us for it involved the entry of a nunc pro tunc judgment after term time. But the Court makes two holdings which have a bearing on the question before us. The Court held that (1) it is the settled law in this State that rendition as well as entry of a judgment on a general verdict is a ministerial act, and judgment may be both rendered and entered on such verdict nunc pro tunc; and (2) where a general verdict is not subject to being set

aside, it is res judicata of the fact issues before the jury, and will serve as a bar to a subsequent suit on the same cause of action, the same as would a judgment.

Then the Supreme Court went on to say this: "We recognize that the opinion of the Commission of Appeals adopted by the Supreme Court in British General Insurance Company v. Ripy, 130 Tex. 101, 106 SW 2d 1047, is not in harmony in all respects with what is written above. That opinion makes no mention of any of the authorities upon which we rely. It appears that they were not called to the attention of the court, and we cannot think that the court intended to overrule them. A strong indication that the court did not so intend is afforded by its action in refusing the application for a writ of error in the Longhorn Drilling Corporation case, supra, a relatively recent case." (Wright v. Longhorn Drilling Corp., 202 SW 2d 825.) Because of the holdings of our Supreme Court in Williams v. Wyrick, supra, we overrule appellants' first point on appeal.

In their second and third points on appeal appellants say that (1) the court erred in submitting issues of adverse possession and limitations, and in divesting the City of Richardson of its rights in Dallas Street by adjudging a limitations title thereto in appellee Gillespie, because said judgment was in contravention of Art. 5517 V.A.C.S.; and (2) it was error to divest the City of Richardson of its rights to Dallas Street upon the basis of the City's disclaimer because said judgment was in contravention of Art. 1019 V.A.C.S.

Art. 5517 provides that the rights of cities to their streets shall not be barred by limitations, nor shall any person acquire title to any portion of a city street by adverse possession. Art. 1019 provides that no street shall be closed until the question of its closing shall be submitted to a vote of its citizens. Appellee contends that Arts. 1018 and 1019 should be interpreted together and are applicable only to streets closed for use by a railroad or other corporation having power of eminent domain. See Session Laws of 1913, page 326. However we shall not pass on the question, for we consider that it is unnecessary to do so in order for us to make a proper disposition of this appeal.

It will be observed that in both their second and third points, appellants are attempting to assert alleged rights in behalf of the City of Richardson. The City has disclaimed any such rights, and has not appealed from the judgment against it. Under the circumstances we do not believe that appellants are entitled to complain of the judgment against the City.

In support of such conclusion we point out that in answer to special issue No. 3 the jury found that appellants will not suffer damage which cannot be compensated for in money if the portion of Dallas Street in controversy is not opened to public use. Appellants do not complain of this finding. It is binding on them. Therefore appellants are not entitled to the injunctive relief for which they prayed. G.H. & S.A. Ry. Co. v. Groff, 118 SW 134; Broussard v. L. Cartwright Realty Co., 179 SW 2d 777; Powers v. Temple Trust Co., 78 SW 2d 951; New Amsterdam Casualty Co.

v. Harrington, 297 SW 307; 43 C.J.S. 455. An injunction to restrain appellee and the City from denying appellants the use of the alleged street is the only affirmative relief asked by appellants. They expressly state that they claim no title to the property.

Furthermore appellants' second and third points assume that the alleged street had not been abandoned prior to 1937. In the absence of a statement of facts we cannot assume that there is no evidence of such an abandonment. On the contrary, we must assume that there is evidence to support the court's judgment. The rule is especially applicable in this case for the court in its judgment expressly recites that "* * * such additional considerations and findings as were authorized by law having been had and made * * *", judgment should be rendered for appellee. At the time the court rendered judgment there was on file appellee's motion for an interlocutory judgment against the City, and attached to the motion was a certified copy of a city ordinance recognizing a prior abandonment of the alleged street. Such confirmation of an earlier abandonment is in no way inconsistent with the jury's finding that the City did not during the summer of 1937 pass an ordinance closing that portion of the street in controversy.

It is true that the jury in special issue No. 2 was asked to find whether the property was ever used by the public prior to 1937, and the jury answered "Yes". But the jury did not find definitely when the property was so used. Appellants allege in their petition that the property was first dedicated as a street in 1873 and then rededicated in 1878.

During that stretch of years there may have been a use by the public, followed by a statutory abandonment of the street, or a common law abandonment of it by the public. We must accept the jury's verdict that sometime prior to 1937 the property was used by the public, but there is no basis in the record for us to reverse the trial court's judgment on the assumption that an abandonment of the street did not take place after such use by the public. Appellants' second and third points are overruled.

We think the trial court properly overruled appellants' motion for judgment on the verdict and judgment non obstante veredicto. The fourth point on appeal is overruled.

The judgment of the trial court is affirmed.

DIXON

DIXON, *Chief Justice.*

Delivered March 14, 1958.

Bernice Couch, et vir,
No. 15,376—v.
City of Richardson, et al,

From District Court of Dallas County.
Friday, March 14, 1958.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be, in all things, affirmed; that the appellees, City of Richardson and Gertrude M. Gillespie do have and recover of the appellants, Bernice Couch and husband, Sterling C. Couch, and of The Travelers Indemnity Company, their surety upon appeal bond, all costs in this behalf incurred or expended, for which execution may issue; and that this decision be certified below for observance.

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Bernice Couch, et vir,
16404
15376—v.
City of Richardson, et al,

Friday, April 25, 1958.

This day came on to be heard the motion of appellants for rehearing of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

Written opinion by Mr. Dixon, Chief Justice.

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Bernice Couch, et vir,
16430
15376—v.
City of Richardson, et al,

Friday, May 30th, 1958.

This day came on to be heard the second motion of appellants for rehearing of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

No. 15,376

Bernice Couch et vir,
Appellants,
v.
City of Richardson et al.,
Appellees.

ON REHEARING.

In their motion for rehearing appellants ask that we reconsider our action in striking the Statement of Facts from the record in this case. They point out that on August 5, 1957 they filed their motion for an extension of time to file the Statement of Facts. The motion was filed on the sixtieth day after the trial court had overruled appellants' motion for new trial. A hearing on the motion for an extension of time was had on October 17, 1957, and on November 1, 1957 we granted a thirty-day extension. Appellants say, and we agree with them, that they are not to be blamed because we did not sooner act on their motion for an extension.

However it was not for that reason that we later, on motion filed by appellees, reconsidered our order and decided that appellants had not complied with Rule 386 T.R.C.P., consequently the statement should be stricken.

Appellants in an attempt to show that they could not have filed the statement within the sixty-day period, attached a letter dated August 2, 1957, from Mr. Ben Allred, Court Reporter, as follows:

> "Replying to your inquiry you are advised that I have just returned from my vacation this week (was

gone almost a month), and that it will not be possible to get out the statement of facts by Monday Aug. 5th which you say is your last day for filing.

"This statement of facts will run several hundred pages—testimony and 31 exhibits, and it would take me at least 2 weeks to get it out under pressure. If you could get an extension of time I would be glad to prepare the statement of facts, and would like if possible 30 days which would give me ample time to do it and carry on my court work without having to work too much overtime."

A study of this letter reveals that appellants had merely made an inquiry of the Court Reporter. They had not requested or ordered a Statement of Facts from Mr. Allred. In a document filed September 24, 1957 appellees allege that upon inquiry made of Mr. Allred on September 23, 1957 they learned that even at that late date he had not yet been asked to proceed with the preparation of a Statement of Facts. This allegation was borne out by the present attorney for appellants (He had not tried the case and had not been brought into the case until sometime after the trial.), who at the hearing held October 17, 1957, admitted in response to a question, that a Statement of Facts had not even then been ordered.

Following our order of November 1, 1957 a Statement of Facts was finally ordered by appellants, and was filed November 25, 1957, more than five months after the motion for new trial had been overruled by the trial court.

Meantime appellees on November 14, 1957 had filed a motion for rehearing, directed at our order of November 1, 1957. After carefully reconsidering the matter we sustained the motion for rehearing and ordered the Statement of Facts to be stricken from the record.

The reason for our striking the statement was that we were compelled to conclude that appellants could have filed the Statement of facts within the sixty days provided by Rule 386 had they acted with diligence. The record shows that they did not even order a Statement of Facts until sometime after October 17, 1957—more than four months after their motion for new trial had been overruled. No reason is shown why the Court Reporter could not have prepared the statement during the month before he went on his vacation. Further, he himself says that he could have had it ready within thirty days after his return from vacation on August 5, 1957, or under pressure could have had the statement ready within two weeks thereafter. Yet he received no order for the statement until more than two months later.

It gives us no pleasure to strike a Statement of facts from a record. We would much prefer that in every appeal we have a full record before us. But where, as in this case, a lack of diligence on the part of appellants accounts for the failure to comply with Rule 386, we are given no choice. As our Supreme Court has said in construing Rule 386 T.R.C.P., "Obviously that restriction left the Court of Civil Appeals with but little discretion in determining

whether or not to permit the late filing of a transcript." Matlock v. Matlock, 249 SW 2d 587, at p. 590. Rule 386 is equally applicable to a Statement of Facts.

Appellants' motion for rehearing is overruled.

/s/ DIXON

DIXON, Chief Justice

Delivered April 25, 1958.

NO. 102,293-E/G

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| BERNICE COUCH, ET VIR<br>VS.<br>CITY OF RICHARDSON, ET AL | IN THE DISTRICT COURT OF DALLAS COUNTY FOR THE 134TH JUDICIAL DISTRICT OF TEXAS |

This, the 2nd day of April, 1956, in the above entitled and numbered cause, wherein Bernice Couch and her husband, Sterling Couch, are plaintiffs, and the City of Richardson and Gertrude M. Gillespie, a feme sole, are defendants, and the said Gertrude M. Gillespie, a feme sole, is cross plaintiff, and the said Bernice Couch and Sterling Couch and the City of Richardson are cross defendants, and came the parties by their attorneys and presented to the court the exceptions contained in the Defendant's Third Amended Original Answer and Cross Action, and in the Plaintiffs' First Supplemental Petition, and the court, having heard the said exceptions and arguments thereon, thereupon did overrule the exceptions numbers 1, 2, 3, 4, 5, 6 and 7 contained in the Defendant, Gertrude M. Gillespie's Third Amended Original Answer; whereupon the defendant, Gertrude M. Gillespie, and cross plaintiff, excepted thereto, and thereupon came on to be heard the Plaintiffs' First Supplemental Petition, and the court, having heard the said exceptions and the argument thereon, overruled the following exceptions: numbers 1, 2, 3, 4, 5, 6, 7, 8, 12, 13, 17, 18, 21(b), 21(g), 21(h), 22 and 23: and sustained the following exceptions: numbers 9, 10, 11, 14, 15, 16, 19, 20, 21(a), 21(c), 21(d), 21(e) and 21(f); and to the action

of the court in overruling such exceptions, the plaintiffs and cross defendants, Bernice Couch and husband, Sterling Couch, excepted, and to the action of the court in sustaining the exceptions as stated above, the defendant and cross plaintiff, Gertrude M. Gillespie, excepted; and thereupon came a jury of good and lawful men and women, who being duly impaneled and sworn, and having heard the pleadings, including disclaimers of the City of Richardson, to the plaintiffs' suit, and to the cross action of the defendant, Gertrude M. Gillespie, the evidence and the argument of counsel, and after the conclusion of the evidence, both plaintiffs and the defendant, Gertrude M. Gillespie, filed their respective motions for peremptory instructions, each of which was by the court overruled, and such parties excepted to the ruling against their motions; the court thereupon submitted to the jury for their verdict, in response to the following issues, definitions and explanatory instructions, upon which the jury, on the 5th day of April, 1956, made the following findings:

NO. 102293

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|---|---|
| BERNICE COUCH, ET AL<br>VS.<br>CITY OF RICHARDSON, ET AL | IN THE 134TH DISTRICT COURT OF DALLAS COUNTY, TEXAS |

GENTLEMEN OF THE JURY:

This case is submitted to you upon Special Issues in the form of questions. In arriving at your answers to these Special Issues, there are standards of conduct to be fol-

lowed, and rules of propriety to be obeyed, which, if disregarded, could make a nullity of these proceedings, and all our efforts could be wasted:

1. You will not be concerned with the effect of your answers, nor the judgment that the Court may render after considering your answers. Neither should you speculate upon who might win or lose the case by such answers.

2. Your answers should be determined without bias, prejudice, sympathy, resentment or any other emotion, except to honestly reflect your findings to the question asked.

3. It is always improper to speculate about, consider, discuss, or even mention costs of litigation, attorney's fees, or any other similar matter not shown by the evidence.

4. You should not mention—nor testify to—any personal knowledge, or information you may have about any fact or person connected with this case, which is not shown by the evidence.

5. When words used in the issues are not used in their ordinary meaning, or have a particular meaning, a proper definition of such words will be submitted to you. You will accordingly receive the law of this case only from the Court as given you in this charge and be governed thereby.

6. You are the exclusive judges of the facts proved, the truthfulness and credibility of the witnesses, and the weight to be given their testimony.

The questions asked are usually begun with the phrase, "Do you find from a preponderance of the evidence" that a certain event, act, omission or transaction took place. A "Preponderance of the evidence" is defined in the law as the greater weight and degree of credible testimony.

Bearing in mind the foregoing instructions and definition, you will answer the following special issues:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that during the summer of 1937 the City Commission of the City of Richardson did not pass an ordinance closing and abandoning, or attempting to close and abandon that portion of Dallas Street in controversy herein?

Let the form of your answer be: "It did not", or "It did."

ANSWER: It did not

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that before 1937 that portion of Dallas Street in controversy was ever used by the public as a road or street?

Answer: "Yes" or "No".

ANSWER: Yes

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that plaintiff Bernice Couch will suffer damages which cannot be compensated for in money, if that portion in controversy of Dallas Street is not opened to public use?

Answer: "Yes" or "No".

ANSWER: No

In connection with special issues No. 4 and No. 5 you are instructed that "Adverse possession" means an actual and visible appropriation of the land, commenced and continued under a claim of right, inconsistent with and hostile to the claim of another.

By the term "claim of right" is meant an intention to claim the land as a person's own.

By the term "peaceable possession" is meant such possession as in continuous and not interrupted by adverse suit to recover the estate.

By the term "hostile" is meant a holding with intention to claim property as a person's own to the exclusion of all others.

"Paying taxes thereon" means paying from year to year as the taxes accrue and before they are delinquent, and includes all taxes assessed against the land.

The term "duly registered" means that such deed or deeds must have been filed in the office of the County Clerk of Dallas County, Texas.

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that defendant Gertrude M. Gillespie, and those through whom she holds conveyances, held peaceable and adverse possession of that portion of Dallas Street in controversy, culti-

vating, using or enjoying the same and paying taxes thereon and claiming under a deed or deeds duly registered for a period of five years or more prior to April 12, 1955?

Answer: "Yes" or "no".

ANSWER: Yes

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that the defendant Gertrude M. Gillespie, and those through whom she holds conveyances, have been in peaceable and adverse possession of that portion of Dallas Street in controversy, cultivating, using or enjoying the same for a period of ten years or more before April 12, 1955?

Answer: "Yes" or "No".

ANSWER: Yes

H. G. Wiggins, Foreman

Which findings were received by the court, and were filed and entered of record in the minutes of the court.

Whereupon, the defendant and cross plaintiff, Gertrude M. Gillespie, having made, and the court having duly heard and considered a motion for judgment, and such additional considerations and findings as were authorized by law having been had and made, and the court being of the opinion that judgment should be rendered as follows;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the court that the plaintiffs take nothing by their suit, and that the cross plaintiff Gertrude M. Gillespie, on the verdict of the jury, and on the disclaimer

filed by the City of Richardson, do have and recover of and from the defendants, Bernice Couch and husband, Sterling Couch, and the City of Richardson, the title and possession of the premises described and bounded as follows:

Being a tract of land in the William R. Bodine Survey, Abstract 153, Dallas County, Texas, conveyed to Johnnie Wright by the City of Richardson November 22, 1937, recorded in Volume 2044, page 10 of the Deed Records of Dallas County, Texas;

Beginning at a point in the intersection of the East right of way line of U. S. Highway 75, with the West line of said William R. Bodine Survey;

Thence North 28° 32′ East with said East right of way line of U. S. Highway 75, 218.20 feet, to a point for corner;

Thence South 61° 28′ East, 80 feet to a point for corner;

Thence South 28° 32′ West, 250 feet to a point for corner;

Thence North 61° 28′ West, 62.92 feet to a point in the West line of the said Bodine Survey;

Thence North 0° 17′ 41″ East with said West line of the Bodine Survey, 36.10 feet to the place of beginning.

for which cross plaintiff may have her writ of possession, and for her costs in this behalf expended, for which, within the same writ or otherwise, she may have her execution. All relief requested by the pleadings not herein specifically granted, is denied.

/s/ Chas. E. Long, Jr.

Judge

Signed, April 11, 1957

LE COPY

APR 28 1959
JAMES R. BROWNING, Clerk

No. 807

In the

# Supreme Court of the United States

OCTOBER TERM, 1959

BERNICE COUCH, *et vir.*, STERLING COUCH,
*Petitioners,*

*v.*

CITY OF RICHARDSON, GERTRUDE M. GILLESPIE,
*Respondents.*

*Application for Writ of Certiorari to the Supreme Court of Texas*

## ANSWER OF THE RESPONDENT, GERTRUDE M. GILLESPIE

LEWIS B. LEFKOWITZ,
JOHN PLATH GREEN,
16th Floor, Kirby, Building,
Dallas 1, Texas.

WILLIAM H. SHOOK,
5922 Swiss Ave.,
Dallas 14, Texas,
*Attorneys for Respondent Gertrude M. Gillespie.*

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711.

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No.....

In the

# Supreme Court of the United States

OCTOBER TERM, 1959

BERNICE COUCH, *et vir.*, STERLING COUCH,
*Petitioners,*

*v.*

CITY OF RICHARDSON, GERTRUDE M. GILLESPIE,
*Respondents.*

*Application for Writ of Certiorari to the Supreme Court of Texas*

## ANSWER OF THE RESPONDENT, GERTRUDE M. GILLESPIE

Comes now Gertrude M. Gillespie, and for answer says the application of petitioners should be denied, and in support thereof respectfully shows to the Court the following:

## JURISDICTION

The Supreme Court of the United States should deny the Application for Writ of Certiorari to the Supreme Court of Texas, among others, for the following reasons:

1. The Supreme Court of Texas, acting in accordance with Texas Law, Refused, N. R. E. the Application for

Writ of Error to that Court. This action on its part terminated its authority and jurisdiction over the judgment of the Court of Civil Appeals. The Court of Civil Appeals for the Fifth Judicial District has the actual possession and exclusive control over that record and its judgment insofar as the law of Texas is concerned. If available, Writ of Certiorari from the Supreme Court of the United States would lie to the Court of Civil Appeals, and not to the Supreme Court of Texas.

2. There is no proof in the record in this Court that Petitioners have or had a justiciable interest in the area claimed to be part of Dallas Street. There is no showing in the present Application that it was established in the Texas Courts that Petitioners had any such right. There was no Statement of Facts. But, even if Petitioners had rights if seasonably claimed, no claim was made or even attempted to be made for protection under Federal right until the Motion for Rehearing was filed in the Supreme Court of Texas. That Court, in the circumstances of the case, under the laws of Texas, then did not have jurisdiction to consider the point.

## QUESTION PRESENTED

We affirm with confidence that the Application for Writ of Certiorari does not present to the Supreme Court of the United States the question propounded here by Petitioners. And we also confidently affirm, that if the question is to be answered, that the answer must be "no". There is no evidence in the record that any proof of any right was

made by Petitioners either in the trial court, or that any proof of any right was adduced before the Court of Civil Appeals or the Supreme Court, nor that any claim of such right was even attempted to be made seasonably, but that such attempt was first made in the Motion for Rehearing in the Supreme Court of Texas.

## STATEMENT OF THE CASE

We have refrained, though with difficulty, from pointing out the many misstatements of Texas law and of the facts contained in the Application for Certiorari, but we do not do so, because all the facts material to the proper disposition of the Application appear from the record without dispute. Despite this, we feel that it is proper to say that the judgment is correct, and that the rulings of the Texas Courts were in accord with the laws of Texas.

There was no Statement of Facts in the case, and hence there was no proof before the Court of Civil Appeals, or the Supreme Court of Texas, that Petitioners had any rights which could have been violated. No attempt was made in the trial court or in the Court of Civil Appeals to claim that a Federal right had been or was being violated. No such claim was made in the Supreme Court of Texas in the Application for Writ of Error to that Court, as was required by the laws of Texas. The very first time any attempt was made to make such claim was in the Motion for Rehearing in the Supreme Court of Texas. This claim was not seasonably made, because under the laws of Texas the Supreme Court of Texas did not have juris-

diction to consider a Point of Error made for the first time in the Motion for Rehearing in that Court.

The Petition for Certiorari is not accompanied by a certified copy of the record.

## ARGUMENT

Petitioners, in the first paragraph under this head, incorrectly assume that the Supreme Court of the United States has general "power of supervision" over the judgments of State Courts. On certiorari the power of the Supreme Court of the United States to review the judgment of the Courts of the States is limited both as to the types of cases, and manner. The limitation directly applicable here is that the Federal questions must be seasonably claimed. This contemplates that it must be done by pleading, and be supported by proof. There was no evidence of right, and no attempt to claim a Federal right until the Motion for Rehearing was filed in the Supreme Court of Texas. When the claim was made, the Supreme Court of Texas did not then have jurisdiction to consider the Point.

Under Texas law the Supreme Court has a limited jurisdiction in passing on applications for writ of error. It can only grant such writs upon points of error assigned in the motion for a rehearing in the Courts of Civil Appeals, and then assigned in the application for writ of error. There was no point or attempt to make any point of error in the Court of Civil Appeals in the Motion for Rehearing in that

Count, nor in the Application for Writ of Error to the Supreme Court. So, therefore, in addition to want of a seasonable claim of Federal right, the Supreme Court necessarily refused the application on Texas law, and could not and did not pass upon or violate any Federal right of Petitioners.

It then necessarily follows that the Supreme Court of the United States will not consider whether the questions of Texas law argued by Petitioners were decided correctly.

The Supreme Court of Texas refused to admit this case into that Court. This action was authorized under State Law. We believe that more than half of the applications for writ of error to that Court are disposed by the order "Refused, No Reversible Error."

In the circumstances, if available on the facts and record, Writ of Certiorari would lie to the Court of Civil Appeals and not to the Supreme Court. *Panhandle Eastern Pipe Line Co. v. Calvert, 347 U. S. 157; 74 S. Ct. 396, 98 Law Ed. 583.*

However, in the instant case, there being no Statement of Facts, and no evidence of any right in Petitioners in that Court, and there being no sort of attempt even to claim any Federal right in that Court, Writ of Certiorari did not and does not lie to that Court, either.

Rule 469, subdivision (c), Texas Rules of Civil Procedure, which controls and governs the jurisdiction of the

Supreme Court of Texas in passing on Applications for Writ of Error to that Court, reads as follows:

> "(e). Points of Error. The Points of Error relied upon, separately numbered, shall be stated in short form without argument and be germane to some assignment of error in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also have been assigned as error in the motion for rehearing in said Court."

The Supreme Court of Texas, in the case of *Harris v. Windsor, reported in 294 S. W. 2d 798*, not yet officially reported, said:

"The Point was not raised in the trial court, in petitioners' brief in the Court of Civil Appeals, or in his motion for rehearing in that court. It is presented for the first time in this court, and cannot, therefore, be considered. *Rule 469 (c) Texas Rules of Civil Procedure; Edwards v. Strong, 147 Texas 155; 213 S. W. 2d 979; East Texas Motor Freight Lines v. Loftis, 148 Texas 242; 223 S. W. 2d 13.*" It should be noted that the Point 2 in *Harris v. Windsor* was raised in the petition for Writ of Error to that Court.

In *East Texas Freight Lines v. Lofttis, 148 Texas, 242, 247*, cited in the case just quoted, the Point was raised in the Petition for Writ of Error, and the Supreme Court overlooked the fact that it had not been raised in the

Motion for Rehearing in the Court of Civil Appeals, and this fact being called to their attention, the Supreme Court, after it had inadvertently granted the Writ, held that it was without jurisdiction to consider said Point. *Moore v. Dilworth, 142 Texas 538, on Rehearing.*

In the case of *Edelman v. California, 344 U. S. 357; 73 S. Ct. 293; 97 Law Ed. 387*, from which we quote, page 391, and where the Federal question was not raised until it was done on the appeal to the Supreme Court of the United States, and that Court said:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the Federal Questions are not seasonably raised in accordance with state law."

## CONCLUSION

Respondent, Gertrude M. Gillespie, respectfully prays the Court to deny the Application for Writ of Certiorari.

Respectfully submitted,

LEWIS B. LEFKOWITZ,
Kirby Bldg., Dallas 1, Texas

JOHN PLATH GREEN,
Kirby Bldg., Dallas 1, Texas

WILLIAM H. SHOOK,
5922 Swiss Ave.,
Dallas 14, Texas,
*Attorneys for Respondent Gertrude M. Gillespie.*